PRIVILEGE AGAINST SELF-INCRIMINATION IN CONGRESSIONAL INVESTIGATIONS INTO OTHER THAN SUBVERSIVE MATTERS

Hutcheson v. United States
369 U.S. 599 (1962)

Petitioner, president of the United Brotherhood of Carpenters and Joiners of America, was subpoenaed to appear before the Senate Select Committee on Improper Activities in the Labor or Management Field (the McClellan Committee). He was called primarily to answer questions concerning the use of union funds in publishing a biography of his father. The inquiry extended, however, to questions concerning the use of union funds to bribe a grand jury in Indiana, a crime for which he was then under indictment in that state.[1] He refused to answer approximately eighteen questions concerning this matter. Although the committee would have permitted petitioner to use his privilege against self-incrimination,[2] he did not wish to do so, for under Indiana law the exercise of this privilege could itself be used against him in the pending state proceedings.[3] Had he answered the questions, his testimony could have been used against him in the same state proceedings.[4] He refused to answer on the ground that the coerced election of either alternative deprived him of due process.

---

[1] He was convicted more than two years later; the case is now before the Supreme Court of Indiana, (according to the Supreme Court, I could find no citation).

[2] Hutcheson v. U.S., 369 U.S. 599, 605 n. 10 (1962). The committee need not have been so generous; U.S. v. Murdock, 284 U.S. 141 (1931), and Hale v. Henkel 201 U.S. 43 (1906) hold that possible self-incrimination under state law is not a ground for refusing to answer questions in a federal inquiry.

[3] Crickmore v. State, 213 Ind. 186, 12 N.E. 2d 226 (1938). Under Twining v. New Jersey, 211 U.S. 78 (1908), and Adamson v. California, 332 U.S. 46 (1947), this would not violate any due process requirements of the fourteenth amendment. A further reason for not invoking the privilege may have been a desire not to violate the AFL-CIO Code of Ethics, Hutcheson v. U.S. *supra,* at 609-10, n.14 (1962).

[4] Although an old statute immunizing witnesses before congressional committees would have prohibited state use of such testimony, 18 U.S.C. §3486, 62 Stat. 833 (1948), Adams v. Maryland, 347 U.S. 178 (1954), (the section "extends protection to all witnesses, to all testimony, and in all courts." at 184), that section was amended, 68 Stat. 745 (1954) immunizing only the testimony of witnesses in subversive investigations. U.S. v. Baker, 293 F. 2d 613 (3d Cir. 1961), *cert. denied,* 368 U.S. 914 (1962).

[5] 11 Stat. 155 (1857), 2 U.S.C. §192 (1952) provides:

> Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses Of Congress, or any committee or either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question under inquiry, shall be deemed guilty of a mis-

For his recalcitrance he was convicted of contempt under 2 U.S.C. 6, §192,[5] sentenced to six months imprisonment, and fined $500.[6] The court of appeals affirmed without opinion.[7] The Supreme Court also affirmed, in an opinion written by Mr. Justice Harlan and joined in by Justices Clark and Stewart.

Petitioner argued two propositions: (1) that the committee should not have asked these questions because they were not pertinent to any properly authorized legislative subject and served merely to expose him to public ridicule; (2) that the coerced election of answering or of invoking the fifth amendment deprived him of due process. The majority found against petitioner on the first issue, and felt that the due process claims were not properly raised or ripe for adjudication. The concurring opinion agreed, but indicated approval of a different result on the second issue in a proper case. The dissenters felt that petitioner's dilemma negatived whatever valid purpose was to be served by the Committee's questions, and that the obstacles presented to petitioner by the Court's previous decisions regarding the privilege against self-incrimination should be removed.

The first issue turned on a long line of cases where witnesses have questioned the conduct and procedure of congressional committees. Through the years the Court has fashioned a framework which Congress must observe in conducting investigations. The inherent power of Congress to conduct investigations as an adjunct to its delegated powers was first recognized by the Supreme Court in *Anderson v. Dunn*.[8] In 1881[9] the Court limited the broad scope of the power by asserting that it was the function of the judiciary, not the legislature, to determine whether the questions asked by a congressional committee were within Congress' constitutional powers of inquiry. The Court later added a second requirement that the investigation itself must be held for a legitimate legislative objective.[10]

In 1929, the Court set forth a third requirement, that the particular questions asked a witness must themselves be pertinent to the matter under

---

demeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month and not more than twelve months.

6 Unreported.

7 285 F.2d 280 (D.C. Cir. 1960).

8 19 U.S. 204 (1821). In the same case the Court sanctioned the power to incarcerate a recalcitrant witness for contempt. Congress apparently still has this power, although it has not exercised the power in recent years. Witnesses are now punished in federal court under 2 U.S.C. §192 *supra* note 4. This section was upheld in *In Re* Chapman, 166 U.S. 661 (1897), as not being unconstitutionally vague. The phrase "any matter under inquiry" was deemed to refer to matters within the jurisdiction of Congress and questions pertinent thereto.

9 Kilbourne v. Thompson, 103 U.S. 168 (1881).

10 McGrain v. Daugherty, 173 U. S. 135 (1927). In *Kilbourne,* the questioning was improper, serving only to expose the witness, against whom a civil suit was pending. In *McGrain* the inquiry into certain acts of misfeasance on the part of the Attorney General, petitioner's brother, was held proper

inquiry.[11] Questions may be pertinent, however, even if the information sought might also be of use in a criminal action pending against the witness.[12] Pertinency, as well as legitimacy of the legislative objective are subject to judicial review.

Recent decisions involving Congressional investigations into Communist activities have stressed that courts will not aid Congress in punishing contempt unless Congress complies with due process requirements: the fifth amendment privilege against self-incrimination must be honored in investigations into Communist activities;[13] the scope of a ruling on pertinency must be "brought home" to the witness at the time he objects;[14] the ruling on pertinency must be adequate;[15] the grand jury indictment must indicate the bases of the pertinency of the question;[16] and the prosecutor must prove that as a matter of law the questions were in fact pertinent.[17]

A recent case involving a state investigation of subversive activity and the NAACP may add two more limitations on the power of legislative investigations.[18] When a committee is investigating communist infiltration into an otherwise legitimate organization, a substantial relationship between the information sought and a subject of overriding and compelling state interest must be shown in advance by clear and convincing evidence.[19] It remains to be seen whether these requirements will be applied equally

---

11 Sinclair v. U.S. 279 U.S. 263 (1929).

12 The Court argued that a question whose answer may tend to incriminate the witness, may nonetheless be pertinent. On the other hand, one could argue, as does Chief Justice Warren, that an inquiry into matters pending before a state court is impertinent and out of bounds.

13 Quinn v. U.S., 349 U.S. 155 (1955); Empsak v. U.S. 349 U.S. 190 (1955). The privilege can be used when questions are asked about communist activities, but not according to the *Hale* and *Murdock* decisions, *supra* note 2, and perhaps *Sinclair, supra* note 11, when questions are asked relative only to possible prosecutions in state courts.

14 Bart v. U.S., 349 U.S. 219 (1955).

15 Watkins v. U.S., 354 U.S. 178 (1957). Petitioner testified freely as to his own communist activities, but refused to give information concerning his past associates on the ground that the questions were not pertinent. The Supreme Court in agreeing with petitioner rejected committee findings that the questions were pertinent to the matter under inquiry. The apparently tough stand taken in this case, and implications that the House Committee on Unamerican Activities enabling resolution was unconstitutionally vague, were discarded in Barenblatt v. U.S., 360 U.S. 109 (1959).

16 Russell v. U.S., 369 U.S. 749 (1962).

17 Deutch v. U.S., 367 456 (1961). Two other cases decided the same year, Braden v. U.S. 365 U.S. 431 (1961), and Wilkinson v. U.S., 365 U.S. 399 (1961), followed *Barenblatt, supra* note 15.

18 Gibson v. Florida Investigating Committee, 372 U.S. 539 (1963).

19 By such a requirement, as the dissent points out, the committee may have to prove in advance the very things it is trying to find out. The witness could then refuse to answer the question because of its redundancy.

to congressional investigations or to investigations of organizations other than the NAACP.[20]

Excerpts of the hearings published in this case adequately support the Court's decision against petitioner's first argument. The subcommittee was investigating the activities of union officials to determine whether additional legislation was needed to protect union funds from abuse.[21] Questions which could determine whether a ranking union official had misappropriated funds to bribe a grand jury were clearly relevant to determine whether Congress should require officials to report disbursements of union funds. The witness was made fully aware of the subcommittee's purpose and of the pertinency of its questions, and he was unable to demonstrate that the committee lacked good faith, *i.e.,* that it was in fact asking the questions only to expose him to public obloquy or to prejudice his trial then pending before a state court.[22]

On the other hand, the Supreme Court was under a compelling obligation to guarantee that petitioner's pending trial in Indiana would not be prejudiced unnecessarily by congressional action. In balancing the competing interests, it may be that undue emphasis was given to the fact-gathering needs of Congress under the circumstances. Much of the information which the committee sought was doubtless available from other sources, (Indiana convicted petitioner on just such information). The testimony of petitioner might have been postponed until after the criminal trial without substantial prejudice to Congress, since the problem under investigation was of a continuing nature and did not specially demand emergency legislation. To a certain extent, the information petitioner possessed was probably merely cumulative as is evidenced by the fact that subsequent federal legislation was enacted without the benefit of his cooperation. Moreover, the harm which could result to petitioner from his congressional testimony being used against him in the state trial, or from the jury's awareness that he had taken shelter in the fifth amendment, was substantial. The case consequently does pit procedural due process needs against the legitimate investigatory needs of Congress, and did

---

[20] *Cf.* NAACP v. Button 371 U.S. 884 (1963); NAACP v. Alabama, 357 U.S. 449 (1958) for an indication that the Court protects the NAACP in areas where it would normally decline to interfere.

[21] Numerous abuses were found, and the Labor Management Reporting and Disclosure Act of 1959 was enacted. 73 Stat. 519 (1959), 29 U.S.C. 401 (1962).

[22] Petitioner had claimed in *Watkins, supra* note 15, *inter alia,* that the committee was trying to expose him for exposure's sake alone. While the Court agreed that Congress could not do this, the Court, and in particular Mr. Justice Frankfurter concurring, declined to look behind the logical relevance of the question, found wanting in that case, to determine pertinency. The Court adhered to this view in *Barenblatt, supra* note 15, *Braden* and *Wilkinson, supra* note 17, while Mr. Justice Black in his dissenting opinions pointed out that the primary purpose of the committee in asking its questions was for exposure. The Court's view he felt, meant that "the committee may engage in any enquiry a majority of the Court happens to think could possibly be for a legitimate purpose, whether that "purpose" be the true reason for the inquiry or not." *Wilkinson, supra* note 17 at 420.

provide an appropriate occasion for the Court to reconsider a proper accommodation between them. Necessarily, any such consideration would have involved a review of the scope of the fifth amendment, the significance of the privilege against self-incrimination under the fourteenth amendment, and the scope of federal and state immunity statutes.

The present condition of the fifth amendment privilege against self-incrimination, as applied to collateral state criminal trials, represents a long and checkered history. In a very early decision, Chief Justice Marshall indicated that a witness in a federal court could claim the privilege when the only danger of incrimination was under state law.[23] Similarly, a case involving the federal immunity statute [24] implied that the immunity granted under federal law would extend to state prosecutions, but avoided saying that the privilege could be used when the only danger of incrimination was under state law.[25] It noted merely that such a danger was too remote on the facts of the case at hand. A later case[26] denied the use of the privilege in a state court where the only danger of incrimination was under federal law. It added as a dictum, however, that immunity would be only coextensive with the particular jurisdiction in question. *Hale v. Hankel*[27] and *U.S. v. Murdock*[28] crystallized this dictum; relying on two English cases, the Court denied the use of the privilege when the only danger of incrimination was under the law of another sovereign.[29] These last two cases were given a firmer constitutional footing after *Twining v. New Jersey*[30], where the Court clearly indicated that the privilege against self-incrimination does not come under the due process clause of the fourteenth amendment; thus a denial of the privilege in state or federal court for incrimination in another is not a denial of due process.

At the hearing petitioner based his refusal on the fifth amendment due process clause, rather than on his privilege. Had he been denied the use of the privilege, the validity of the *Hale* and *Murdock* decisions would have been called into question. Had its use been permitted the validity of *Twining* and *Adamson v. California*[31] could have been put in issue. Because of his express disclaimer, the Court felt that the due process claim could not serve to raise the applicability of the privilege, although, re-

---

[23] U.S. v. Saline Bank, 26 U.S. 100 (1828). The Court in the instant case feels this to be merely a rule of equity and not a constitutional requirement, Hutcheson v. U.S., at 608, n. 13.

[24] 27 Stat. 443 (1893).

[25] Brown v. Walker, 161 U.S. 591 (1896).

[26] Jack v. Kansas, 199 U.S. 272 (1904).

[27] *Supra* note 2.

[28] *Supra* note 2.

[29] Queen be Boyes, 1 B&S 311, 121 Eng. Rep. 730 (Q.B. 1861). King of the Two Sicilies v. Wilcox, 1 Sim (N.S.) 301, 61 Eng. Rep. 116 (Ch. 1851). A later English case, U.S.A. v. McRae (1867) L.R. 3 Ch 19, permitted the exercise of the privilege, indicating that the test is one of remoteness as used in Brown v. Walker, *supra* note 25.

[30] *Supra* note 3.

[31] *Supra* note 3.

liance on one clause does not ordinarily preclude reliance on the other.[32] He also argued that the possible use of his privilege in the state trial was a denial of due process, but the Court felt that it could not determine that issue other than on appeal of his state conviction. Similarly, his contention that due process had been denied him in that the hearings were a pre-trial of his state conviction, was also dismissed on the ground that it was not ripe for adjudication.

Despite the technical soundness of each of these rulings, taken as a whole they result in petitioner's being sent to federal prison for contempt, a fate which he might have been spared had he answered or relied on his privilege. It is fundamentally unfair to imprison petitioner because he sought to avoid the penalties attached to either of these two courses of action, penalties imposed by this Court. In this manner he does question prior decisions concerning the privilege, because they created the bind which denied him due process. The Court should have examined the possibilities of overruling these decisions.

Mr. Justice Douglas has long advocated the overruling of *Adamson,* which would result in the inclusion of the privilege in the fourteenth amendment.[33] In the instant case, this would mean that if petitioner chose to rely on his privilege in the committee hearing, due process would require that this fact not be commented upon later at the state trial. This solution, however, does not answer the basic federal question presented by the *Hale* and *Murdock* decisions, namely that under the dual sovereignty theory, the privilege just does not extend beyond protection against the sovereign immediately involved.

To relieve petitioner of his dilemma completely, not only must the privilege be brought within the due process clause of the fourteenth amendment, but the *Hale* and *Murdock* decisions must also be overruled. Such a result would not be particularly startling in light of the new composition of the Court, and the dicta in Mr. Justice Brennan's concurring opinion in the instant case that these cases should be overruled.[34]

One basis of such a decision would be to follow Mr. Justice Brennan's reasoning that since the first and fourth amendments are incorporated into the due process clause of the fourteenth amendment, there is no longer any logical or historical basis for discrimination against the fifth amendment privilege against self-incrimination.[35] In other words, he feels that the privilege is just as essential to concepts of fundamental fairness and ordered liberty as rights guaranteed under those two amendments. If it is a basic idea in our society that one should not have to participate in one's own conviction, then the difference between a coerced confession and a

---

[32] U.S. v. Baranblatt, *supra* note 15 at 112.

[33] *Cf.* Rochin v. California, 342 U.S. 165, 179 (1952), and Hutcheson v. U.S., *supra* note 2 at 641. The Court seems to have recently drawn on self-incrimination to extend search and seizure and involuntary confession evidence, Wong Sun v. U.S., 83 S.Ct. 407 (1963).

[34] Hutcheson v. U.S. *supra* note 2.

[35] Cohen v. Hurley, 366 U.S. 117, 159 (1961).

stomach pump on the one hand, and incrimination by court room utterances on the other, is merely one of degree and not a difference in kind.

Another approach would be to pursue Mr. Justice Black's argument in *Mapp v. Ohio*,[36] *viz*, that the basis for extending the exclusionary rule of the fourth amendment to the states should be that the admission of such evidence is self-incriminating under the fifth amendment.[37] If the privilege is then considered to be implicit in the concepts of fundamental fairness and ordered liberty in the context of search and seizure, it would follow that to protect this right, its use could not be commented upon when used in a legislative investigation. Furthermore, due process would require that the use of the privilege be permitted in federal forums when the tendency to incriminate would be under state law and vice versa.

If this be done, problems would arise as to the extension of federal and state immunity statutes. While Congress could extend immunity to state prosecutions[38] as a necessary and proper exercise of its enumerated powers, there is no constitutional basis for a state to protect witnesses from prosecution in other state or federal courts by means of an immunity statute. Indeed, constitutional questions would be raised if immunity were extended by states into areas in which Congress had chosen to act. Even if it could be so extended, the results might be undesirable because the tendency for abuse, particularly by Southern States, would be great.[39] However, just as was done before *Mapp v. Ohio*, federal courts could exclude testimony obtained at state interrogations under their supervisory powers, to prevent the abuse of the "silver platter" doctrine.[40]

If these steps were taken, petitioner in the instant case could have asserted his privilege, without fear that this fact would be commented upon later. Or conversely, if immunity had been granted, he could have been free to testify, and this evidence would not have been available to the prosecution in the pending state trial. This result would mitigate some of the harshness arising from our federal system: if only one jurisdiction had been involved, petitioner would not have been faced with this dilemma.

---

[36] 367 U.S. 643 (1961).

[37] This idea was first given expression by Mr. Justice Bradley in Boyd v. U.S., 116 U.S. 616 (1881), and has been used by Justices Black and Douglas in their dissenting opinions. *Cf.* Ullman v. U.S., 350 U.S. 422 (1956). Douglas does not distinguish in and out of court incrimination. It could be argued that the latter method of incrimination presents a greater opportunity for abuse and hence is entitled to greater protection than the former.

[38] As it has done before with congressional investigations, see note 4 *supra*.

[39] For example, in cases involving racial violence, a white person acquitted or sentenced slightly, would then be immune from federal prosecution.

[40] Under this doctrine, evidence obtained from illegal search and seizure by a federal officer, though excluded from federal courts could be handed over on a "silver platter" to state officials and vice versa. Lustig v. U.S. 338 U.S. 74, 79 (1948), overruled in Elkins v. U.S., 364 U.S. 206 (1960). Here a state could, through the use of its own immunity statutes gain testimony and other evidence which it could then turn over to federal officials for federal prosecution. Federal courts could simply exclude testimony so obtained, although they would not be constitutionally required to do so.